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# Supreme Court of the United States

October Term, 1962

No. 1007

JOHN ARTHUR LUOMOLA,

*Petitioner,*

*against*

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case on April 5, 1962.

### The Opinions Below

The District Court wrote no opinion. The *per curiam* opinion of the Court of Appeals is reported at 301 F. 2d 138, and is annexed hereto as Appendix A, *infra*, page 11.

### Statement of Grounds of Jurisdiction

The judgment of the Court of Appeals was entered on April 5, 1962 (Appendix A, *infra*, at page 13).

The jurisdiction of the District Court was based upon 18 U. S. C. Sec. 3231 and upon 21 U. S. C. Sec. 176(a).

The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1); under 28 U. S. C. Sec. 2103; and under Rule 37(c) of the Federal Rules of Criminal Procedure.

28 U. S. C. Sec. 2103 provides, in pertinent part, as follows:

> "If an appeal to the Supreme Court is improvidently taken from the decision of the highest court of a state, or of a United States court of appeals, in a case where the proper mode of a review is by a petition for certiorari, this alone shall not be ground for dismissal; but the papers whereon the appeal was taken shall be regarded and acted on as a petition for a writ of certiorari and as if duly presented to the Supreme Court at the time the appeal was taken."

The instant petitioner took an appeal from the judgment of the United States Court of Appeals, Ninth Circuit (Appendix B, *infra*). This appeal was, in fact, improvidently taken, both with respect to form of remedy and with respect to timeliness, as shown in Appendix C, *infra*, wherein the petitioner personally relates the circumstances under which he prepared his appeal *pro se* while imprisoned and physically restrained from retaining counsel or writing his own papers in any timely manner.

Rule 37(c) of the Federal Rules of Criminal Procedure provides, in pertinent part:

> "Petition to the Supreme Court for writ of certiorari shall be made in the manner and within the time prescribed by its rules."

The above-quoted statutory language clearly confers jurisdiction upon this Court to entertain petitions for certiorari filed in whatever time or manner this Court may rule just and proper. In other words, timeliness herein is discretionary, not jurisdictional. See *Heflin* v. *United States*, 358 U. S. 415, 418, fn. 7 (1959). This Court has never

held to the contrary. *United States* v. *Robinson*, 361 U. S. 220, was decided upon a wholly different issue, namely, the jurisdiction of the Court of Appeals under Rule 45(b) of the Federal Rules of Criminal Procedure.

The circumstances set forth in Appendix C show that this is a situation where the thirty day filing rule of this Court should not be automatically applied. While such rule is susceptible of complete application to a person who has his freedom, it should not be so applied to the petitioner, a prisoner who for a period of thirteen (13) days (5 in transit and 8 in isolation) was in captivity, which made preparation and filing of a petition for a writ of certiorari absolutely impossible. The proper suspension of the running of the thirty-day period for these thirteen days makes the filing of the Notice of Appeal on or about May 8, 1962 a timely filing of an application for a writ of certiorari (28 U. S. C. 2103; Rules, Sup. Ct. 22(2)).

## Question Presented

Whether the Sixth Amendment to the Constitution requires that a Federal District Court permit court-appointed counsel for the defendant in a criminal trial to withdraw and be replaced by counsel retained by the defendant on motion of the defendant before pronouncement of sentence.

## Statement of the Case

Petitioner was indicted, tried, convicted and sentenced in United States District Court for the Southern District of California on a charge of illegally importing approximately one pound of marijuana into the United States in violation of 21 U. S. C. Sec. 176a.

On trial in the District Court, petitioner was represented by court-appointed counsel. After the verdict, and before

pronouncement of sentence, petitioner moved for a continuance in order to substitute counsel of petitioner's own choice, retained by petitioner for the purpose of presenting to the Court certain facts and points of law affecting petitioner's sentence and judgment of conviction. (See Petitioner's Affidavit, Appendix C, *infra*). Leave for petitioner's court-appointed counsel to withdraw, and be replaced by counsel retained by petitioner, was requested of the District Court, both by the court-appointed counsel and by petitioner himself. (See Excerpt from Transcript of Trial Minutes, Exhibit D, *infra*). The minutes show that the motion was brusquely overriden by the District Court:

> "The Court: * * * Now, are you ready for sentence?
>
> The Defendant: No, your Honor.
>
> The Court: You can sit down. Counsel will take care of that.
>
> Mr. Sheela: Your Honor, the defendant has engaged—of course I was appointed—he has engaged an attorney, Mr. Shamsky, to represent him after the motion for a new trial has been made, and I believe that he would like to have me relieved at this point and make a motion for continuance on the judgment.
>
> The Court: The motion is denied. And I am going to pronounce sentence at this time. And if there is anything that develops later on, we will take it up as it comes. The Court will now pronounce sentence.
>
> Mr. Sheela: Your Honor, of course, it is obvious that my participation in this case is going to end very shortly, but from the statements that counsel has made, I think perhaps it would be in the interests of everyone were the sentence matter to be continued over—for how long, three or four days?
>
> The Defendant: Yes.
>
> Mr. Sheela: Three or four days so that this other attorney could come in and be representing him; because this is the first I knew that he had retained an attorney at this point. I told him that I didn't feel,

I didn't want to handle and he, want to handle the appeal on this matter although—and he does have some other matters that he wants to present prior to judgment so—and I can't see how the government would suffer because he will be incarcerated.

The Court: I am going to pronounce judgment. * * *

* * *

The Court: If there is anything you want to say before sentence is pronounced, say it further. This is your last opportunity now.

The Defendant: Yes, I wish that judgment is not pronounced until I be given an opportunity to have Mr. Shamsky appear and show further cause, your Honor.

The Court: That motion is denied."

The Court forthwith sentenced petitioner to five years imprisonment without affording petitioner herein an opportunity to be represented by counsel of his own choice.

A notice of appeal was filed in the United States Court of Appeals, Ninth Circuit, on January 19, 1961. The Court of Appeals found no error, and affirmed the judgment of the District Court on April 5, 1962.

## Reasons for Granting the Writ

This petition directly invokes the constitutional right of a defendant in a criminal proceeding to retain counsel of his own choice at any stage of trial, under the Sixth Amendment, which provides:

> "In all criminal prosecutions, the accused shall enjoy the right * * * to have the assistance of counsel for his defence."

The right to retain counsel of one's own choice has recently received less attention than the cognate right to court-appointed counsel for indigent defendants. Yet